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No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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We are somewhat embarrassed in defending this writ of error, because the plaintiff in error has proceeded very informally and has disregarded many important rules of procedure and practice governing the trial of cases and the prosecution of writs of error designed for the protection of courts and the rights of parties. The two main contentions of the plaintiff in error are that the evidence

is insufficient to justify the verdict in favor of the defendant F. Romeo & Co., Inc., and that the court committed error in the instructions which it gave to the jury. Neither of these contentions can be presented on this writ of error because the proper procedure for presenting them to this court was not followed. There was never any request made to the trial court by plaintiff in error to withdraw the case from the jury, or to direct a verdict in its favor, which makes it impossible for this court to consider the first contention, nor were any exceptions taken to the instructions to the jury except one which is unimportant. We will demonstrate the insufficiency of the record in these two respects more in detail in the body of our brief.

We are embarrassed also in replying to the brief of plaintiff in error because it does not comply with rule 24 of this court. There is no "precise abstract or statement of the case", nor is there "a specification of the errors relied upon" in accordance with rule 24. It will be necessary for us to supply below the statement of the case which plaintiff in error has neglected to furnish.

Statement of the Case.

During the year 1918 one F. A. Mennillo entered into a written contract to sell a large amount of Greek style and ripe olives to the defendant in error, shipment to be made after approval of samples by representative of defendant in error (Record, p. 48).

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During April, 1919, F. A. Mennillo shipped two carloads without submitting any samples to defendant in error. He then applied to F. Romeo, the representative of defendant in error, for payment, which was refused because the goods had not been examined and because the previous shipment had not been satisfactory in quality. It was finally agreed that the defendant in error would pay $8000 and that a draft for the balance of the invoice price ($5743.63) was to be accepted by the defendant in error in New York after examination of the olives upon arrival if found to be satisfactory (Record, p. 50).

The plaintiff in error had all the stock of olives of F. A. Mennillo in pledge (Record, p. 42), and to enable F. A. Mennillo to deliver the two carloads of olives to the defendant in error, arrangements had to be made by him with the plaintiff in error. Accordingly defendant in error on May 2, 1919, paid $8000 on account of the invoice price of the two cars of olives (which amounted to $13,743.63) and at the same time Mennillo, through his attorney in fact, drew a draft in his own favor on defendant in error for the balance of the invoice price, and indorsed this draft to the Bank of Italy, which thereupon surrendered the bills of lading (Record, pp. 41-42). There is a direct conflict in the evidence as to the nature of the obligation of defendant in error, if any, to accept this draft so drawn against it. Defendant in error proved, however, that its president agreed with F. A. Mennillo's agent to

accept the draft sued on after the goods arrived in New York, but only on condition that examination of the olives by the defendant in error after their arrival showed that they were of satisfactory quality (Record, pp. 50-51). This agreement was repeated in the presence of Mr. Moore, who represented the plaintiff in error in this transaction at the time the draft was delivered to the plaintiff in error (Record, p. 65). After the defendant in error paid the $8000 and F. A. Mennillo's agent drew and delivered the draft for $5743.63 to plaintiff in error, the latter released the bills of lading for the two carloads of olives (Record, p. 45) which thereafter went forward to defendant in error. The two carloads of olives arrived in New York City about May 21, 1919 (Record, pp. 82, 83). Examination of the olives by defendant in error proved them to be seriously defective, which is not denied by plaintiff in error. As soon as this was discovered defendant in error telegraphed F. A. Mennillo stating that the olives were defective in quality and requesting that he appoint an agent to examine them (Defendant's Exhibit B). F. A. Mennillo did not do this and did not in any other way offer to settle the matter or to receive back the olives. Finally after several weeks of correspondence (Defendant's Exhibits C, D, E, F and G) defendant in error advised F. A. Mennillo that the olives would be sold and that F. A. Mennillo would be held for damages for breach of warranty (Defendant's Exhibit H). The olives were sold by de-

fendant in error in the usual course of trade and it was stipulated at the trial that the selling of these olives did not realize enough to repay defendant in error the $8,000 it paid to plaintiff in error on May 2, 1919 (Record, p. 111).

I.

ANSWERING PLAINTIFF IN ERROR'S CONTENTION THAT THERE IS NO EVIDENCE TO JUSTIFY THE VERDICT.

(a) Plaintiff in error is not entitled to contend that there is no evidence to justify the verdict.

Plaintiff in error devotes the major portion of its brief to its contention that there is no evidence to justify the verdict in behalf of the defendant F. Romeo & Co., Inc., its discussion of this point being found on pages 4 to 29, both inclusive. But plaintiff in error is unable to contend in this court that there is no evidence to justify the verdict, because plaintiff in error at no time requested the trial court to withdraw the case from the jury, and it is a well-settled principle of the law of appeal and error that plaintiff in error cannot complain that there is no evidence to sustain the verdict unless he requested the trial court to take the case from the jury. Plaintiff in error at the close of the defendant's case did not move the court for a verdict in its favor, nor did plaintiff in error request the court to instruct the jury to render a verdict in its favor, nor did the plaintiff in error in any other manner request the trial court to take the case from the

jury on the ground that there was no evidence justifying the submission of the case to the jury. This rule is more than a technical rule of procedure, but was established for the guidance and protection of the trial court and of the parties. It is not fair to the trial court not to give it an opportunity to withdraw the case from the jury where the evidence is insufficient to justify the submission of the case to the jury, nor is it fair to the party prevailing below not to give him an opportunity to present additional proof if he has not made a case sufficient to present to the jury. The rule is the same whether a case is tried before a jury, or whether a jury is waived. In either event, a party who claims to be entitled to a judgment as a matter of law must make that contention in the trial court in order to preserve his right to make that claim in the appellate court. The authorities in this circuit are as follows:

Pennsylvania Casualty Company v. Whiteway, 210 Fed. 782, at 784; where the court said:

"When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court",

Brolaski v. United States, filed February 13, 1922, and not yet reported,

and

Pabst Brewing Co. v. E. Clemens Horst Co., 264 Fed. 909, at 911, and cases cited.

Cases from other circuits to the same effect are as follows:

Sun Publishing Co. v. Lake Erie Co., 157 Fed. 80;

City of Lincoln v. Sun Vapor Co., 59 Fed. 756;

Mexico Land Co. v. Larkin, 195 Fed. 495;

Wear v. Imperial Window Glass Co., 224 Fed. 60;

U. S. Fidelity & Guaranty Co. v. Board of Commissioners, 145 Fed. 144, at 151;

Royce v. Delaware Lackawanna etc. Ry Co., 203 Fed. 467.

Furthermore no exception was taken to the verdict (Record, p. 124) and the bill of exceptions does not contain any specifications of insufficiency of the evidence to justify the verdict. It is well settled that both these steps must be taken to enable the plaintiff in error to complain of the submission of the case to the jury.

California Code of Civil Procedure, section 648;

Matter of Baker, 153 Cal. 537, at 542;

Estate of Behrens, 130 Cal. 416, 418;

Winterburn v. Chambers, 91 Cal. 170, 185.

A further defect in the record is that in the assignment of errors in this case there are no specifications of the insufficiency of the evidence to justify the verdict.

It has been held in this circuit that the assignment of errors must specifically state wherein the evi-

dence is insufficient to justify the submission of the case to the jury. It is true that the plaintiff in error did make the following assignments of error:

> "14. In failing to instruct the jury to find in favor of the plaintiff."
> "15. In entering judgment against the plaintiff on the verdict of the jury."
>
> (Record, page 135.)

It has been held, however, that such a general assignment of error is insufficient to enable the appellate court to consider the insufficiency of the evidence. This rule is well stated in *Doe v. Waterloo Mining Co.,* 70 Fed. 455, at 461, decided by this court in 1895. The language of the court on this point is as follows:

> "Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court. The assignment of error in question reads as follows: 'There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complaint.' This is too general. There is no specification showing wherein the decree is not supported by the evidence. It is not correct that the seven additional assignments of error are specifications under this assignment."

(b) The evidence fully supports the verdict.

While we are satisfied that the plaintiff in error has not the right to complain that the case should not have been submitted to the jury because he in no way presented the point to the trial court, it is submitted that there was abundant evidence to justify the verdict of the jury in favor of the defendant in error. Plaintiff in error contends that the evidence was insufficient to justify the verdict in two respects: The first of these is that the jury in effect found that the promise of the defendant F. Romeo & Co., Inc., to accept the draft was conditional. The following excerpts from the testimony of the defendant F. Romeo show without doubt that the promise to accept the draft was conditional and that the plaintiff in error was so informed more than once. Defendant F. Romeo met the drawer of the draft, who was the seller's representative, at his hotel a short while before the defendant F. Romeo and the drawer of the draft went to the office of the plaintiff in error. Defendant F. Romeo testified as follows, in regard to the understanding between himself and the drawer of the draft, entered into at the hotel:

> "A. It was understood that all the olives before shipping should have been approved by myself and when that shipment was not examined, I objected to taking that shipment. Then he invited me to make some proposition. I offered him about 50 per cent of the invoice because the previous shipment of olives was not satisfactory in quality and then we agreed that I was going to pay $8000, and *the balance was*

to be conditioned on accepting a draft in New York after the examination and approval of the quality of the olives."

"That conversation took place in the Clark Hotel, Los Angeles, where I was living at that time" (Record, p. 50).

Defendant F. Romeo then went to the office of plaintiff in error with Mr. C. R. Mennillo, the agent of F. A. Mennillo, and F. Romeo stated what occurred there in the following words: "We went to the bank on May 2nd and there I told Mr. Moore the same arrangement that I had made with Mr. Mennillo" (Record, p. 51). Mr. Moore at that time was the assistant manager of the plaintiff in error in Los Angeles, who handled the transaction in question for the plaintiff in error (Record, p. 44).

Plaintiff in error contends that F. Romeo did not tell the plaintiff in error that the agreement to accept the draft was conditional and in support of this contention quotes from the cross-examination of F. Romeo. The examination of this witness, however, conclusively shows that this witness positively stated to Mr. Moore, representing the plaintiff in error, that the agreement to accept the draft was conditional on the quality of the olives being found to be satisfactory on examination of the goods after their arrival in New York. The testimony of F. Romeo regarding the conversation with Mr. Moore at the office of plaintiff in error is as follows:

"Q. But it is quite possible, Mr. Romeo, that you did not specifically make that condi-

tional statement, namely, that the draft would only be accepted in case the goods met with your approval, in the bank?

A. *That was understood, Mr. Moore knew that.*

Q. You say he knew that. You had never talked to Moore about it?

A. *Well, I stayed there about half an hour in the bank, and we were talking about this transaction.*

Q. But you have no independent recollection of making that statement to Mr. Moore, that you say was made in the conversation between you and Mr. Mennillo?

A. Well, if I had promised to accept it on that condition, I would except that I would.

Q. That is not an answer to the question. You are not positive, as you have just stated?

A. *I think we had the conversation, otherwise Mr. Moore would not have accepted the draft."*

(Record, p. 58.)

"A. *It was distinctly understood that I was paying $8000 and that we intended to assume no more obligation on that shipment until the goods were examined in New York."*

(Record, p. 59.)

This testimony of Mr. Romeo is reinforced by similar testimony on his re-direct examination, where he stated as follows:

"While we were at the Bank of Italy, Mr. Mennillo said we had to draw on my firm for the balance of the invoice at 60 days' sight. *The draft was to be accepted after examination and approval of the quality of the olives—that was said in Mr. Moore's presence."*

(Record, p. 65.)

The other claim of insufficiency of evidence to justify the verdict is that there is no evidence showing that defendant F. Romeo Co., Inc., rejected the olives shipped to it by the drawer of the draft. The record shows that Mr. Joseph Lodato, who was an employee of the defendant in error, stated that the olives involved in this sale arrived in New York City about May 21st or May 22nd, 1919, and that the olives were brought to the store of the defendant in error within two days after their arrival and were there inspected immediately (Lodato's deposition, p. 77). The testimony shows without contradiction that the olives were of a defective quality. Indeed this is not disputed in the brief of the plaintiff in error. The olives were sold by the defendant in error under circumstances which will be hereafter stated in detail. It was stipulated at the trial that the sale of the olives realized less money than the $8000.00 advanced by the defendant in error, so that instead of there being any money to turn over to the seller of the olives, the defendant in error sustained a loss as a result of the transaction (Record, p. 111). In other words, there was a loss even leaving out of consideration the alleged liability of the defendant in error under the draft in question. The facts relating to the rejection of the olives may be briefly stated as follows:

On May 23, 1919, F. Romeo & Co., Inc., telegraphed F. A. Mennillo of Los Angeles advising him of the condition of the olives and requesting F. A. Mennillo to "please appoint somebody to verify

our claim" (Defendant's Exhibit B). On May 24, 1919, F. A. Mennillo telegraphed F. Romeo & Co., Inc., that its claim was without foundation, but stated that without prejudice to the terms of the contract under which the goods were shipped his brother would call on F. Romeo & Co., Inc., on unofficial inspection (Defendant's Exhibit C). On Juné 4, 1919, F. Romeo & Co., Inc., again wired F. A. Mennillo advising him of its claim, and in conclusion said, "We now have two cars ripe and one car green olives rejected. Give us disposition at once" (Defendant's Exhibit D). On June 5th F. A. Mennillo replied that the position taken by him in his letter of May 29th was absolutely correct (Defendant's Exhibit E). On June 10th F. Romeo & Co., Inc., wired F. A. Mennillo suggesting that they submit the matter to arbitration, F. A. Mennillo to agree to be bound by the arbitration (Defendant's Exhibit F). On June 13th F. Romeo & Co., Inc., wired F. A. Mennillo again suggesting that the matter be submitted to experts for arbitration, each to be bound by their decision (Defendant's Exhibit G). On July 9th F. Romeo & Co., Inc., wired F. A. Mennillo that the two cars of ripe olives would "be sold to best advantage and we will hold you in damages for breach of warranty" (Defendant's Exhibit H). On July 10th Mr. Mennillo wired F. Romeo & Co., Inc., that he had nothing to add to his previous correspondence on this subject (Defendant's Exhibit I). It will be seen from this that F. A. Mennillo was fully advised of the claim

of F. Romeo & Co., Inc., that the olives were defective and F. A. Mennillo was given every opportunity to investigate the merits of the claim either by examining the olives or by submitting the olives to examination by experts as arbitrators. Finally the patience of F. Romeo & Co., Inc., was exhausted and it advised F. A. Mennillo, as it had the legal right to do, that it would sell the olives and hold F. A. Mennillo liable in damages for the breach of the warranty of the quality of the olives. This last telegram was more than six weeks after the first telegram to F. A. Mennillo, advising him of the defective condition of the olives and the claim of F. Romeo & Co., Inc.

Mr. Francisco Romeo also testified that his firm had rejected the olives for which the draft in question was drawn. He stated that:

> "After the olives arrived in New York they were examined by me and by other members of our firm. I did not leave them at the railroad station. They were in our store. They were there at the time they were examined; that was the understanding. We never redelivered them to the railroad station; we offered them to Mr. Mennillo if we got our money back; we held the olives subject to his orders. The correspondence will show that. There ought to be correspondence showing that we advised Mr. Mennillo that we held the olives subject to his order." (Record, pp. 58-59.)

We submit that the jury could come to no other conclusion than that the defendant in error had absolutely rejected the olives and rescinded the sale.

Counsel for plaintiff in error misapprehends the law when he asserts that defendant in error accepted the olives by selling them; for it is perfectly clear that the defendant in error was simply following the provisions of the Uniform Sales Act, in force in New York at the time the sale was made, and was foreclosing the lien given it by the Sales Act when it sold the olives. That this court will take judicial notice of the statutes of every state in the union including those of the State of New York is well settled.

23 C. J., 127, Section 1945;
Lamar v. Micou, 114 U. S. 218, 223; 29 L. Ed. 94;
Pennington v. Gibson, 16 How. 65, 81; 14 L. Ed. 847;
Southern Pacific Co. v. DeValle Da Costa, 190 Fed. 689, 697;
Varcoe v. Lee, 180 Cal. 338, 343.

The original contract of sale of the olives was made in the State of New York and under the notification thereof relating to these two car loads, New York was the state for the performance of the contract since the olives were to be shipped thither and examined there on arrival. Furthermore the domicile of the purchaser of the olives was in New York and that was where the olives were situated when they were examined and defendant in error objected to their quality. In view of these facts it is clear that the law in force in the State of New York

would govern the rights and remedies of the defendant in error arising from the breach of the contract as to the quality of the olives.

Section 69 of the Uniform Sales Act, found in Section 150 of the Personal Property Law of New York (L. 1911, Ch. 571), Subdivision (d) provides as follows:

> "Where there is a breach of warranty by the seller, the buyer may, at his election rescind the contract to sell, or the sale, and refuse to receive the goods, or if the goods have already been received, return them or offer to return them, to the seller and recover the price or any part thereof which has been paid."

Subdivision (5) of the same section provides:

> "Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by Section 53."

Section 53 of the Sales Act (Section 134 Personal Property Law of New York, L. 1911, Ch. 571) gives the right of resale as defined by the Sales Act.

Section 60 of the Sales Act (Section 141 of the Personal Property Law of New York, L. 1911, Ch. 571) provides that in making the resale only reasonable care and judgment need be exercised and that the resale may be made either by public or private sale; also that notice of the resale need not be given.

The evidence shows that defendant in error resold the olives in the manner provided by the Uniform Sales Act.

In this case F. A. Mennillo was advised that a resale of the goods would be made by the defendant in error after Mennillo failed to take back the olives or arbitrate the dispute, and there is no contention made by plaintiff in error, nor could there be, that the sale was not fairly made and for the highest possible market price. The plaintiff in error claims that there was an acceptance of the goods by reason of the commingling of the olives with those of the stock of defendant in error, but plaintiff in error can point to no testimony to prove this. The facts were that the ripe olives were commingled, not with other property of the defendant in error, but with another shipment of olives from the seller (Exhibit N) which were of the same size, style and defective condition *and similarly rejected;* but these two shipments were kept entirely separate and apart from the stock of F. Romeo & Co., Inc. Furthermore, when these olives were sold, a separate account was kept of the proceeds of the sale and no complaint has been made as to the division of the proceeds between the two shipments. The following testimony of Giovanni F. Romeo is conclusive on this subject:

> "I made an examination of that carload upon arrival and found the olives to be *in the same condition* as the previous car of ripe olives. *The olives covered by Exhibits 'N' and 'L' are the same size and style of olives.* After arrival, the carload of ripe olives covered by Defend-

> ant's Exhibit 'L' was set aside, that is they were placed in one corner of the warehouse and orders were given that they were not to be sold until instructions from the office. The same was done with the olives shipped under Exhibit 'N'. By that I mean that they were set aside and orders were given that they be not sold until instructions were issued to that effect, and they were so set aside. The olives under Exhibits 'L' and 'N' were commingled and there were no identifying marks whereby we could subsequently tell the olives of one shipment from those of another. *These olives were subsequently sold and we kept a separate account of these two lots; it would have been very difficult to keep these two accounts separate because of the limited space in the store.*" (Record, pp. 86-87.)

Plaintiff in error seeks also to give the impression that two different kinds of olives were commingled by defendant in error, namely, Greek style olives and ripe olives, which was not the case however. On page 17 of its brief, plaintiff in error states: "Fourth, that after examination the goods were commingled with other goods and carried in the general stock of the defendant"; and at page 18 of its brief, second paragraph, plaintiff in error quotes testimony showing that defendant in error showed some *Greek style* olives to customers and brokers; but there is no evidence whatever that the Greek style olives were commingled either with the ripe olives from Mennillo or with the stock of defendant in error. The evidence quoted at the bottom of page 17 of the same brief, shows that the olives that were commingled were the two cars of

ripe olives covered by Exhibits "L" and "N", and it also appears clearly from the testimony of Giovanni F. Romeo (at pages 86 and 87 of the Record) that the olives covered by Exhibits "L" and "N" were ripe olives and that the Greek style olives were covered by Exhibit "K". We have already shown that the two cars of ripe olives were kept separate from the stock of defendant in error and *not* commingled with it.

But even if we should assume for the sake of argument that the defendant in error accepted the olives, it is clear that it did not at any time waive their defective quality, but on the contrary at all times protested their quality, and in its final telegram to Mennillo of July 9th, 1919, stated it would hold him for damages. The plaintiff in error therefore failed to show a fulfillment of the condition attached to the promise to accept the draft; for there was neither approval of the olives nor waiver of approval. The verdict of the jury established that the promise of the defendant in error to accept the draft was so conditioned.

Plaintiff in error contends (Brief, p. 20) that

> "not a single word of protest was sent to the Bank of Italy concerning the character of the goods nor was there ever an attempt made by the defendant to render an account to the Bank of Italy."

The following extracts from the record sufficiently answer these claims:

Joseph Lodato, assistant treasurer of the defendant in error, testified as follows:

> "A draft was presented to me by the East River National Bank *for the Bank of Italy,* a copy of which draft is set out in paragraph five of the complaint; * * * I do not keep the memorandums. When the draft was first presented to me that day, I do not remember whether any memorandum was attached to it; *I told the messenger that we would not accept the draft, as we did not find the goods satisfactory.* The messenger then went back to the bank." (Italics ours.)
>
> (Record, pp. 29-30.)

Extract from testimony of F. Romeo, president of defendant in error:

> *"We wanted to submit an account for the sale of these olives to the Bank of Italy and they did not want to accept that.* We never did submit any account to the Bank of Italy for the sale of these olives. We had nothing to do with the Bank of Italy; we notified Mennillo that we kept the goods subject to his order, and unless he gave disposition we were going to sell for his account." (Italics ours.)
>
> (Record, p. 61.)

The authorities cited and quoted from on pages 22 to 28 of brief of plaintiff in error are not applicable to the facts in this case, which, as before shown, comprise a rejection of the goods and a notification that they would be sold for Mennillo's account.

II.

PLAINTIFF IN ERROR HAS NO RIGHT TO ATTACK THE INSTRUCTIONS TO THE JURY BECAUSE IT DID NOT EXCEPT TO THEM.

The second of the two main points urged by plaintiff in error on this appeal is that the instructions of the court to the jury were prejudicially erroneous. Plaintiff in error discusses the instructions on pages 30 to 34, and 38 to 42 of its brief. In discussing these instructions, plaintiff in error necessarily went outside of the record, because the bill of exceptions as settled by the trial court contains no exceptions to the instructions, except a general exception and the following attempted exception, which we claim is so vague and indefinite as not to constitute a proper exception. The general exception has, of course, no effect. The only attempt at a specific exception consists of the following:

> "Well the only part I object to is the portion with reference to the effect of accepting the oral promise * * * that portion of the charge that the court instructed the jury that they should take into consideration the effect of accepting the oral promise."

Rule 10 of this court is as follows:

> "The judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

The rule of the District Court for the Northern District of California with regard to exceptions to instructions to a jury is as follows:

> "91. *Exceptions to a charge.* Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the court of its own motion, the grounds of exception shall be specific; as to instructions requested by the parties the grounds may be general. The judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same. If, after the jury have retired to deliberate upon their verdict, they return into court and request further instructions, the court may, in the absence of counsel, give such instructions, and such instructions shall be deemed excepted to by each party."

As stated by plaintiff in error, the entire charge was given upon the court's own motion.

Furthermore the foregoing single attempt to take a specific exception was unfair in that counsel for plaintiff in error said that the court instructed the jury "that they *should* take into consideration the effect of accepting the oral promise". The substance of the court's charge on this point was that they *might* take this into consideration. The language of the court on this point was as follows:

> "If the plaintiff was going to pay out over five thousand dollars on this draft, and if as a condition to doing that, it was requiring the defendant to make an absolutely unconditional promise to pay, you may properly ask whether it is or is not probable that it would have taken an oral promise; or would it have required a written acceptance? In balancing the probabilities and improbabilities on this point, you may consider the admitted fact that at the very time the defendant's president was present at the bank, and according to the plaintiff's evidence, was authorized to enter into a formal written acceptance: and further,—if you believe the plaintiff's testimony—that the draft was there made out, and of course it could have been endorsed was a written acceptance forthwith and without very much trouble."
>
> (P. 118, Trans. of Record.)

This instruction is so fair that we are surprised at the criticism it has evoked. The trial judge did not in any way intimate an opinion as to whether he believed an oral unconditional promise to accept the draft in question had been made or not. He simply pointed out the various factors that the jury might consider without, however, suggesting what his personal opinion was.

The authorities are uniform to the effect that such comment on the evidence is perfectly proper.

The rule governing the giving of instructions in the federal courts is well stated in 14 Ruling Case Law 743, as follows:

> "While the province of the court and the jury is quite distinct in the federal courts, it is the right and duty of the court to aid the jury

> by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge."

Among the authorities applying this rule are:

Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 574; 34 L. ed. 784, 787;

Simmons v. United States, 142 U. S. 148, 155; 35 L. ed. 968, 971;

United States v. Philadelphia & R. R. R. Co., 123 U. S. 113, 114; 31 L. ed. 138, 139.

As to the other criticisms of the instructions made by the plaintiff in error, while we believe them to have been absolutely fair and proper in every respect, we will not trespass on the time of this court by discussing them, because any such discussion would involve matters outside of the record. It is elementary that the plaintiff in error can only complain of those matters that are contained in a bill of exceptions, and there being no other exceptions to the instructions in the record, there is nothing further for us to discuss. The bill of exceptions is, of course, conclusive as to what took place at the trial. See:

Moss v. Gulf Compress Co., 202 Fed. 657.

The Supreme Court of the United States has recently held that it will not even consider an admission of counsel as to the proceedings which is contrary to the account of the proceedings in the bill of exceptions. See the recent case of *Guerini Stone Co. v. Carlin Construction Co.,* 248 U. S. 334, at 342; 63 L. Ed. 275, at 284.

We resent the suggestion that there was any stipulation preventing us from objecting to the lack of exceptions to the instructions. Plaintiff in error has no right to quote the matter set forth on page 35 of its brief, purporting to be from page 6 of the reporter's transcript, because it does not appear in the bill of exceptions nor anywhere else in the record. What actually occurred with regard to the taking of exceptions is stated in the opinion of the learned trial judge regarding the settlement of the bill of exceptions as follows:

> "Touching the instructions to the jury, I have corrected the proposed bill to make it speak truly. The exceptions interpolated in the proposed bill were not in fact taken; that is conceded. Counsel for the plaintiff seeks to justify their insertion now by invoking a statement made from the bench early in the trial that 'all adverse rulings would be deemed to be excepted to'. But this was intended only for rulings upon the admission and exclusion of evidence. * * * The statement here relied upon from the bench has been made by the writer in a great number of cases, covering a period of many years, and now for the first time the suggestion is made that it should be regarded as relieving attorneys from the necessity of particularizing their exceptions to in-

structions. It is difficult to believe that counsel here could have so understood at the time. Such a meaning would imply an intent on the part of the presiding judge not only to set aside a standing rule of the district, but to transcend a standing rule of the appellate court. But it conclusively appears that such was not the understanding at the time. Counsel did not rely upon such a theory, but immediately after the instructions were given he undertook expressly to take exceptions. Such action would have been wholly unnecessary if the subject was understood to be covered by the statement now relied upon. But even if he had had such an understanding, he was at the time expressly advised that, to be of any avail to him, his exceptions to the instructions must be specific and particular; whereupon there was an attempt at specifications, such as the foregoing record shows."

(Trans. of Record, pp. 124, 125 and 126.)

From this full explanation of the trial judge it appears conclusively that there was no stipulation between the parties as to "adverse rulings"; that the statement by the court that all "adverse rulings would be deemed to be excepted to", did not apply to instructions given and refused; and that counsel for plaintiff in error was fairly warned by the lower court that his attempted exception to the charge was insufficient and that it would recall the jury if counsel desired to take further exceptions to the instructions.

Concerning the attempted exception to the bill of exceptions, it will also be noted that counsel for

plaintiff in error made no remarks at all about the instructions until after the jury had retired (Trans. of Record, page 123). It is well established and has been recently held in this circuit that exceptions to the instructions to a jury must be taken while the jury is still at the bar (see *Miller & Lux Inc. v. Petrocelli,* 236 Fed. 846). The statement of the trial judge in his opinion settling the bill of exceptions that the jury was in the hall while counsel for plaintiff in error attempted to take exceptions and was considered by the court as still being at the bar can, of course, not alter the legal effect of the situation. It will be noted from the record that the trial court said:

> "Of course they (the jury) are gone from the box, but are in the corridor and I will have them return if you so desire and permit either side to take exceptions." (Trans., page 124.)

Counsel for plaintiff in error did not request the return of the jury, and the jury did not return, so that the fact remains that any exception he attempted to take was not taken in the presence of the jury.

III.

DISCUSSION OF VARIOUS ADVERSE RULINGS COMPLAINED OF BY PLAINTIFF IN ERROR.

Plaintiff in error on pages 42-44 of its brief complains of various rulings as to the admission and rejection of evidence which we will take up in the

order mentioned in the brief of the plaintiff in error.

1. Plaintiff in error complains of the court sustaining an objection to the question propounded to the witness Lacy and refers to page 129 of the Transcript of Record for the ruling complained of. This is the first assignment of error in the assignment of errors.

We have examined all of Mr. Lacy's testimony as set forth in the bill of exceptions at pages 46 and 47 of the record but we do not find any ruling or exception in the record regarding the matter set forth in the Assignment of Errors so we need not discuss this assignment of error. Assuming, however, that the ruling complained of were found in the bill of exceptions it is obvious that counsel for plaintiff in error was asking the witness Lacy for a conclusion of law, which is never admissible in evidence.

2. Plaintiff in error referring to Assignment of Error II next objects to the admission in evidence of the contract of sale of the olives by F. A. Mennillo to the defendant in error, contending in its brief that this contract was hearsay and not binding on the plaintiff in error. This contract was testified to by Mr. F. A. Mennillo, whose testimony was introduced on behalf of the plaintiff (Record, p. 32). Inasmuch as Mr. F. A. Mennillo testified at some length concerning the contract in question on his direct examination conducted by the counsel

for the plaintiff in error, there is no doubt but that defendant in error had a perfect right to introduce the original contract in evidence to show exactly what the contract provided. Furthermore the entire rebuttal of the plaintiff in error consisted of the introduction in evidence of the provisions of the contract appearing on the back thereof (Record, p. 113).

3. The next ruling complained of by plaintiff in error referring to Assignment of Error III is stated in the assignment of errors as follows:

> "In overruling the objection of plaintiff to the testimony of F. Mennillo in regard to the contract between Mennillo and F. Romeo & Co." (Record, pp. 129-130.)

This must be a mistake on the part of the plaintiff in error; for it is an objection to testimony introduced by itself. The testimony of F. A. Mennillo was introduced on behalf of the plaintiff in error (Record, p. 31). Furthermore the bill of exceptions (Record, pp. 31-40) does not show any objection or exception to any ruling on the testimony of F. A. Mennillo.

4. The next ruling complained of (covered by Assignment of Error V) is the admission in evidence of the letter dated May 2, 1919, from F. Romeo to F. Romeo & Co., Inc., known as defendant's Exhibit "B". Plaintiff in error on the cross-examination of witness F. Romeo asked him whether he had reported all that occurred with

regard to the particular shipment of olives involved in the transactions at the Bank of Italy on May 2, 1919. In answer to this question the witness F. Romeo testified as follows:

> "I reported everything that transpired with reference to this particular shipment made by Mennillo and which was paid for by that draft of $8000 on May 2nd; I reported all this to my office and there was no disapproval of what I had done." (Record, p. 62.)

Defendant's Exhibit "B", was simply a written report by Mr. F. Romeo to defendant in error of the modification of the contract with F. A. Mennillo concerning the method of paying for this shipment of olives negotiated at the office of the plaintiff in error. It requires no argument to show that defendant in error had a perfect right to introduce the report in evidence which plaintiff in error cross-examined the witness F. Romeo about.

5. The next error, assigned as VI in the assignment of errors, complains of the admission in evidence of a telegram from F. Romeo to the defendant in error dated April 29, 1919, known as defendant's Exhibit "C". While defendant's Exhibit "C" was objected to counsel for plaintiff in error did not give any ground for the objection (Record, p. 63) and it is well settled that an objection without any ground cannot be relied upon on appeal.

Toplitz v. Hedden, 146 U. S. 252, 255; 36 L. ed. 961, 962;

Pennsylvania Co. v. Clark, 266 Fed. 182, 187.

Furthermore this telegram advised the defendant in error of F. Romeo's negotiations with F. A. Mennillo's agent. Plaintiff in error on cross-examination asked the witness F. Romeo whether he kept his office informed as to the different moves he was making (Record, p. 62). Therefore defendant in error had a right to show exactly what information F. Romeo sent to his office regarding his negotiations with Mr. Mennillo's agent.

6. The last assignment of error relied on, X, complains of the introduction in evidence of certain testimony of Marie J. Romeo. In this case also plaintiff in error merely objected to the question calling for the conversation between F. Romeo and C. R. Mennillo without specifying any ground for its objection. This ruling cannot therefore be reviewed on appeal. Assuming that the plaintiff has a right to review this ruling, the introduction in evidence of this conversation was perfectly proper since the conversation referred to the modification of the contract of sale of olives by F. A. Mennillo to defendant in error which modification was pleaded in defendant's answer (Record, pp. 10 and 12). The answer pleaded and the proof of defendant in error showed that the agreement of the defendant in error to accept the draft sued on was conditioned on the olives being found to be of satisfactory quality upon examination on their arrival in New York. The modification of the agreement between F. A. Mennillo and defendant in error, agreed to by F. Romeo, was certainly material as tending to show

whether the promise to accept the draft was conditional or unconditional and Mrs. Romeo's testimony regarding this conversation was therefore also material.

7. Plaintiff in error on page 43 of its brief also complains generally of the admission in evidence of certain telegrams and communications between F. Romeo and the defendant in error. Plaintiff in error does not, however, refer to any assignment of error in this connection or refer to any rulings in the bill of exceptions. No rulings are quoted, no discussion is attempted and no authorities are cited so that defendant in error does not deem it necessary to answer such vague charges of error.

IV.

MISCELLANEOUS MATTERS.

As all the evidence in the case, of a promise to accept, showed that the promise was oral and not written, the verdict of the jury in favor of the defendant in error will not be disturbed, because under the Uniform Negotiable Instruments Law, which was in effect in California at the time the promise was made (California Statutes 1917, Chapter 751), a promise to accept a bill must be in writing. The Uniform Negotiable Instruments Law was enacted in California as a part of the Civil Code. The portions thereof referred to are as follows:

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"3213. Acceptance; How Made, etc. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

"3216. Promise to Accept; When Equivalent to Acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

See

Rambo v. First State Bank of Argentine, 128 Pac. 182 (Kansas, 1912);

Erickson v. Inman & Co., 54 Pac. 949 (Ore., 1898);

Clayton Townsite Co. v. Clayton Drug Co., 147 Pac. 460 (New Mexico, 1915);

Van Buskirk v. State Bank of Rocky Ford, 83 Pac. 778 (Colo., 1905).

The authorities to the contrary cited at pages 30 and 31 of brief of plaintiff in error antedate the Uniform Negotiable Instruments Law.

Plaintiff complains of the instruction of the court on the question whether the plaintiff in error parted with value and suggests that the counsel for defendant in error gave no intimation that there was to be any contention that the plaintiff in error had not parted with actual value for the draft and had not offered any testimony to controvert this point. The

complaint contained the allegation (Record p. 3, paragraph VIII) that Mennillo endorsed the draft to the plaintiff in error for the sum of $5743.63 and the defendant in error denied that Mennillo so endorsed it for said sum or any sum or otherwise (Record p. 8, paragraph IV). The very full evidence submitted on the part of the plaintiff in error and quoted from on pages 39-40 of plaintiff in error's brief shows that the alleged payment for the draft was nothing but a credit and there is no evidence whatever that the credit was ever drawn upon by Mennillo. It is, of course, well settled that the extension of credit by a bank does not constitute giving value until the credit is actually used. McKinzie Ltd v. Parsons, 113 N.W. 858 (2

We submit that the record shows that this case was fairly tried and that no error was committed by the trial court and defendant in error therefore asks that the judgment be affirmed.

Dated, San Francisco,
February 25, 1922.

Respectfully submitted,

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